[ORAL ARGUMENT SCHEDULED APRIL 13, 2017
BEFORE JUDGES ROGERS, GRIFFITH, AND SRINIVASAN]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BANNER HEALTH F/B/O BANNER GOOD SAMARITAN MEDICAL CENTER, *et al.*, Appellants, v. THOMAS E. PRICE, M.D., Secretary, U.S. Department of Health and Human Services, Appellee.	No. 16-5129

APPELLANTS' NOTICE OF SUPPLEMENT TO JOINT APPENDIX

Appellants are filing a supplement to the Joint Appendix to correct the inadvertent omission of the below three pages from the Joint Appendix.

- Plaintiffs' Motion for Leave to Further Amend and Supplement First Amended Complaint [ECF 108], page 3 (JA 228A).
- Plaintiffs' Motion for Summary Judgment and Request for Oral Hearing [ECF 127], Exhibit 6, pages 40-41 (JA 315A-315B).

Dated: March 24, 2017

Respectfully Submitted,

/s/ Stephen Nash

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BANNER HEALTH f/b/o BANNER GOOD SAMARITAN MEDICAL CENTER, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:10-cv-1638 (CKK)
KATHLEEN SEBELIUS, Secretary, U.S. Department of Health and Human Services,	)	
Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FURTHER AMEND AND SUPPLEMENT FIRST AMENDED COMPLAINT

Plaintiffs commenced this action by filing a Complaint on September 27, 2010. On December 23, 2010, Plaintiffs filed the First Amended Complaint. On July 27, 2011, Plaintiffs filed a Notice of Claims.

Plaintiffs made a Freedom of Information Act request to OMB seeking HHS's submissions to OMB for HHS's rulemakings to revise the Outlier Payment Regulations in early 2003, as well as its Fixed Loss Threshold Regulations for FYs 2003, 2004 and 2005. In February 2012, in response to this request, OMB provided the Interim Final Rule (IFR) (E.O. 12866 Submission for CMS-1243-IFC, Feb 12, 2003), signed by the then-Secretary on February 12, 2003. Plaintiffs were not previously aware of the IFR. Shortly thereafter, on March 23, 2012, Plaintiffs moved to compel the Secretary to supplement the administrative record with the IFR. On May 16, 2013, the Court granted that motion, but the Secretary then moved for reconsideration of that order, which the Court denied on July 30, 2013. The Secretary then supplemented the administrative record with the IFR on July 31, 2013.

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July 7, 2003

ADDITIONAL MODELING OF FFY 2004 OUTLIER PAYMENTS

ESTIMATE OF THE FFY 2004 FIXED LOSS AMOUNT ACCOUNTING FOR MORE RECENT COST REPORTS LIKELY TO BE AVAILABLE TO CMS BY OCTOBER 1, 2003

Two basic assumptions were made. The first is that by October 1, 2003 more recent Medicare cost reports will become available to CMS, compared with the current (March 31, 2003) update of the HCRIS database. More specifically, cost reports with the most recent HCRIS ending date of December 31, 2001, or earlier, will be updated by one year. Cost reports in the current version of HCRIS with ending dates in calendar year 2002 will not be updated. The ending dates of the most recent cost reports in the current HCRIS version are summarized in the table below.

MOST RECENT HCRIS COST REPORTS FOR HOSPITALS IN THE CMS PROPOSED FFY 2004 IMPACT FILE

COST REPORTS ENDING IN CALENDAR YEAR	Count
No HCRIS Matching Cost Report	110
1996	1
1997	1
1998	2
1999	23
2000	272
2001	2,209
2002	1,557
Total	4,175

The second assumption was that the annual rate of change in CCRs for all hospitals is a decrease of 8.25 percent. The rate was derived by assuming an annual increase in costs equal to the Hospital Market Basket, currently projected to be 3.5 percent, and an annual increase in charges of 12.8083 percent, the CMS charge increase factor in the Proposed Rule. The CCRs of hospitals with the most recent cost reporting ending date of December 31, 2001 or earlier were decreased by this rate.

With these assumptions, the fixed loss amount resulting in the same amount of outlier payments as the Proposed Rule scenario is estimated at **$26,880**.

The assumption regarding more recent cost reports used to derive the CCRs was modified to reflect the instructions to Fiscal Intermediaries (FIs) in the CMS Program Memorandum A-03-058 dated July 3, 2003. The Program Memorandum instructs the FIs to update the CCRs "not later than 45 days after the date of the tentative settlement or final settlement used in calculating the CCRs". Combining this deadline with the maximum of eight months between the end of the cost reporting period and tentative settlement, it is reasonable to expect CCRs to be updated no later than nine months after the end of the cost reporting periods.

Under this assumption hospitals will have their FFY 2004 outlier payments based partly on the 2002 CCR and partly on the 2003 CCR depending on the fiscal period ending date (FPE). Hospitals with a January FPE will have their CCR updated to the FPE January 2003 by October 31, 2003. Their FFY 2004 outlier payments would be based on the FPE January 2002 CCR for one month (October 2003) and on the FPE January 2003 for the remaining eleven months. Similarly, FFY 2004 outlier payments for hospitals with a February FPE will be based on the 2002 CCR for two months and on the 2003 CCR for ten months, and so on. Hospitals with a December FPE would have their FFY 2004 outlier payments based entirely on the FPE December 2002 CCR.

The assumption was modeled by calculating an "effective" FFY 2004 CCR for hospitals in the current version of HCRIS. The effective CCR is a weighted average of the 2002 and 2003 CCRs. The weighting factors are the number of FFY 2004 months to which each CCR applies. If a hospital's most recent cost reporting period in the current version of HCRIS ended in 2002, its 2002 CCR is already available. Its 2003 CCR was projected from the 2002 CCR using the annual rate of change in CCRs of –8.25 percent. (See above for an explanation of this rate.) For HCRIS hospitals with the most recent cost reporting periods ending in 2001, the 2002 and 2003 CCRs were projected from the 2001 CCR for one and two years, respectively. A relatively small number of hospitals in the current version of HCRIS have most recent cost reporting periods ending in years prior to 2001. It was assumed their cost reports would be updated by no more than two years. Consequently, their effective FFY 2004 was calculated as a weighted average of one-year and two-year projected CCRs. Finally, for hospitals in the Impact File with no matching HCRIS reports, the Impact File values were used as effective FFY 2004 CCRs.

The fixed loss amount resulting in the same amount of outlier payments as the Proposed Rule scenario is estimated to be **$25,375** under these assumptions.